

PREPARED STATEMENT OF
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Before the
COMMITTEE ON INDIAN AFFAIRS
of the
UNITED STATES SENATE

on

S. 1011, THE NATIVE HAWAIIAN GOVERNMENT REORGANIZATION ACT OF 2009

August 6, 2009

Mr. Chairman, Mr. Vice Chairman, and distinguished Members of the Committee, thank you for the opportunity to testify before you today on S. 1011, the Native Hawaiian Government Reorganization Act of 2009. My testimony will focus on the constitutional issues raised by Congress's potential passage of this legislation. I do not presume to comment on the desirability of S. 1011 as a policy matter.

At the outset, I want to note that I am not being compensated in any way, have no clients (paid or unpaid), and indeed have no relationship with any of the entities interested in this legislation. My views reflect my own judgment about the legal issues involved – they are not at the behest of anyone else.

In 1996, I wrote a law review article titled *Equal Protection and the Special Relationship: The Case of Native Hawaiians* that appeared in the Yale Law Journal. In it, I concluded that programs for Native Hawaiians would be subject to the strict scrutiny applicable to racial classifications under *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), rather than the rational basis review applicable to programs for Indian tribes under *Morton v. Mancari*, 417 U.S. 535 (1974). In the article, I suggested that Congress could try to avoid application of strict scrutiny by recognizing a Native Hawaiian tribe. I noted that such a congressional action would raise difficult questions about the outer limits of what can constitute an “Indian Tribe[]” under the Indian Commerce Clause of the Constitution, Art. I, § 8, cl. 3, and I did not provide a definitive answer to those questions. I remain in that position today. I think the constitutional question is a difficult one.

I. The Constitutionality of S. 1011 Is Uncertain

The issue is in some ways straightforward: the Supreme Court has held that legislation singling out groups defined by their race or ancestry are subject to strict scrutiny and presumptively invalid. The Supreme Court has also held that programs for Indian tribes are subject to rational basis review. Some groups clearly are “tribes” for this constitutional purpose (e.g., the Navajo Nation),

and some groups clearly would not be, even if Congress recognized them (e.g., descendants of Vikings).¹ The question is on which side of the line the contemplated Native Hawaiian government would fall. The problem is that the answer to this question is not obvious.

A. S. 1011 Stands on Weaker Constitutional Footing than Earlier Legislation and Recognitions

Recognition of a Native Hawaiian government would test the constitutional minima for an “Indian Tribe[]” under the Indian Commerce Clause. No tribe has ever had the paucity of connections that exist among Native Hawaiians. Most tribes have existed from historical times to the present as communities of members who lived together under the governance of a tribal government. Some tribes were less well organized, but all were groups of Native Americans who lived together as a meaningful community with extensive bonds among them.

S. 1011 envisions a tribe quite different from those that have preceded it.² Native Hawaiians as defined in S. 1011 do not appear to have anything in common beyond their ancestry.³ There are

¹ See Alex Tallchief Skibine, *Making Sense out of Nevada v. Hicks: A Reinterpretation*, 14 St. Thomas L. Rev. 347, 367 n. 139 (2001) (“[A]lthough Congress has a lot of leeway in ‘recognizing’ Indian tribes, there are limits to such plenary power. For instance, Congress could not take a group of people in Minnesota claiming to be descendants of some Celtic or Viking tribe and recognize them as an ‘Indian’ tribe for the purposes of the Indian Commerce Clause of the Constitution.”).

² S. 1011 provides the criteria for the group that will create a Native Hawaiian government, rather than creating the government itself. It is of course possible that the membership of the government that arises out of the S. 1011 process will be limited to “Native Hawaiians” defined more narrowly than S. 1011 defines the Native Hawaiian participants in the process. But S. 1011 leaves open the possibility that all Native Hawaiians, as defined in S. 1011, will be eligible for membership in the new Native Hawaiian government. And given the composition of the electorate (i.e., all Native Hawaiians, as defined in S. 1011) that possibility is very real.

³ S. 1011’s definition of Native Hawaiian is a bit complex. Section 3(10)(A) provides in relevant part that:

“Native Hawaiian” means –

(i) an individual who is 1 of the indigenous, native people of Hawaii and who is a direct lineal descendant of the aboriginal, indigenous, native people who –

(I) resided in the islands that now comprise the State of Hawaii on or before January 1, 1893; and

(II) occupied and exercised sovereignty in the Hawaiian archipelago, including the area that now constitutes the State of Hawaii; or

(ii) an individual who is 1 of the indigenous, native people of Hawaii and who was eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act (42 Stat. 108, chapter 42) or a direct lineal descendant of that individual.

Section 3(1) further provides:

ABORIGINAL, INDIGENOUS, NATIVE PEOPLE – The term “aboriginal, indigenous,

bonds within many subgroups of Native Hawaiians. Groups of Native Hawaiians have created many organizations – Hawaiian Civic Clubs, myriad pro-sovereignty groups, etc. But none of these organizations has the allegiance of all Native Hawaiians. Even the Native Hawaiian groups with the largest memberships claim no more than a fraction of Native Hawaiians among their members. And, more to the point, S. 1011’s definition of Native Hawaiians is not limited to those who have joined groups devoted to Native Hawaiians, or who otherwise have established connections with the Native Hawaiian community. So long as a person has a single ancestor who was an aboriginal inhabitant, he or she is a Native Hawaiian under S. 1011.

And Native Hawaiians are quite diverse along almost every conceivable axis. As George Kanahēle noted more than two decades ago, “While their ancestors once may have been unified politically, religiously, socially, and culturally, contemporary [Native] Hawaiians are highly differentiated in religion, education, occupation, politics, and even in their claims to Hawaiian

native people” means people whom Congress has recognized as the original inhabitants of the lands that later became part of the United States and who exercised sovereignty in the areas that later became part of the United States.

The apparent reason for this somewhat cumbersome definition is to move away from the formulation that was at issue in *Rice v. Cayetano*, 528 U.S. 495 (2000) – “any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.” Haw. Rev. Stat. § 10-2; see Le’a Malia Kanehe, *The Akaka Bill: the Native Hawaiians’ Race for Federal Recognition*, 23 U. Haw. L. Rev. 857, 880 (2001). In operation, however, the two definitions appear to apply to the same group of people. The “people whom Congress has recognized as the original inhabitants of the lands that later became part of the United States and who exercised sovereignty in the areas that later became part of the United States” are the descendants of the aboriginal inhabitants of Hawaii as of 1778. That is how most of the federal statutes regarding Native Hawaiians are written, and thus “who[] Congress has recognized as the original inhabitants” of Hawaii. And all such descendants would further satisfy § 3(10)(A), because, by the terms of the definition of “aboriginal, indigenous, native people” in § 3(1), their ancestors “resided in the islands that now comprise the State of Hawaii” before January 1, 1893 and “occupied and exercised sovereignty in the Hawaiian archipelago.” See Kanehe, *supra*, at 880 (stating that this definitional change “does not affect who is considered a Native Hawaiian under federal law.”).

S. 1011’s definition of “Native Hawaiian” would also apparently include people whose ancestors were aboriginal inhabitants of “lands that later became part of the United States” other than Hawaii and who migrated to Hawaii before 1893. If so, this would introduce a new complication to the definition: the statute would be drawing distinctions among 19th century immigrants and inhabitants to Hawaii based on their ancestry – e.g., Californian Native Americans who moved to Hawaii in 1870 would be “Native Hawaiians,” and other Californians would not. But in reality this may not be an issue, because there may not be any descendants of aboriginal, but non-Hawaiian, migrants to Hawaii who are from lands that are now part of the United States. And, in any event, it would not change the constitutional status of the definition. In *Rice*, Hawaii suggested that “some inhabitants of Hawaii as of 1778 may have migrated from the Marquesas Islands and the Pacific Northwest, as well as from Tahiti.” 528 U.S. at 514. The Court noted this possibility but concluded that it did not change the racial nature of the classification, stating flatly: “Ancestry can be a proxy for race. It is that proxy here.” *Id.*

identity.” George S. Kanahale, *The New Hawaiians*, 29 Soc. Process in Haw. 21, 21 (1982).⁴ In addition, Native Hawaiians live in all 50 states and the District of Columbia. See Office of Hawaiian Affairs, *Native Hawaiian Data Book* 17 (2006). Census data indicate that more than 40% of Native Hawaiians live outside Hawaii, many of whom likely have never been to Hawaii or have any connection to it beyond one or two ancestors. The community of Native Hawaiians as defined by the Hawaiian Homes Commission Act of 1920 (“any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778”), Pub. L. No. 34, § 201(a)(7), 42 Stat. 108 (1921), has a greater connection to pre-1778 Hawaiians, but S. 1011 is defined more broadly than that.

The closest historical example to S. 1011 is the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. §§1601-29h. Like S. 1011, ANCSA provided for the creation of entities (Alaska Native Regional Corporations and Alaska Native Village Corporations) that had not previously existed, and provided that they would receive certain property. And those new entities have been included in some of the statutory definitions of “Indian tribe.” But in contrast to S. 1011’s definition of Native Hawaiian as everyone with even one pre-1778 ancestor, ANCSA defines a “Native” as “a person of one-fourth degree or more Alaska Indian” or one “who is regarded as an Alaska Native by the Native village or Native group of which he claims to be a member and whose father or mother is ... regarded as Native by any village or group.” 43 U.S.C. § 1602(b). As this definition suggests, ANCSA built upon the existing set of traditional Alaska Native villages, which had existed as functioning governments for generations and which had been eligible for recognized status under the Indian Reorganization Act since 1936 (two years after the Act’s passage). These Alaska Native Villages thus had had the legal status of tribes for decades. And the organization of the Alaska Native villages into the regions that were the basis of the new corporations reflected their connections, with the statute requiring that each region in Alaska be “composed as far as practicable of Natives having a common heritage and sharing common interests.” 43 U.S.C. § 1606(a).⁵

⁴ Or, as was noted more recently, “Clearly, much of the traditional culture, particularly language, that was practiced by Native Hawaiians or brought by immigrant groups during the period of plantation labor recruitment (1852-1946) has been lost by their descendants, and assimilation into ‘local’ and a generalized American culture has occurred.” Jonathan Y. Okamura, *Ethnicity and Inequality in Hawai‘i* 6 (2008).

⁵ Justice Breyer underscored the degree to which defining tribal membership based on having even one pre-1778 ancestor is unprecedented in his concurrence in *Rice v. Cayetano*, 528 U.S. 495, 516 (2000):

Native Hawaiians [i.e., those with 50% or more native blood], considered as a group, may be analogous to tribes of other Native Americans. But the statute does not limit the electorate to native Hawaiians. Rather it adds to approximately 80,000 native Hawaiians about 130,000 additional “Hawaiians,” defined as including anyone with one ancestor who lived in Hawaii prior to 1778, thereby including individuals who are less than one five-hundredth original Hawaiian (assuming nine generations between 1778 and the present)....

I have been unable to find any Native American tribal definition that is so broad. The Alaska Native Claims Settlement Act, for example, defines a “Native” as “a person of one-fourth degree or more Alaska Indian” or one “who is regarded as an Alaska Native by the Native

S. 1011 goes beyond ANCSA because it has no blood quantum requirement and does not build upon any existing entities. The federal and state governments have created programs and entities to aid Native Hawaiians, and there are a variety of organizations devoted to the betterment of Native Hawaiians, but they are a far cry from self-governing entities. Interestingly, the furthest that Congress seemed to push the boundary of what could be characterized as an “Indian Tribe[]” is an entity that has no power and thus will not be subject to an equal protection challenge in court (unlike the envisioned Native Hawaiian government). I am referring to ANCSA’s provision for an Alaska Native Corporation for Alaska Natives who did not live in Alaska. That corporation differs from the envisioned Native Hawaiian government in that, on the one hand, it was composed of people living outside Alaska, but, on the other hand, its members could be (and often were) members of existing Alaska Native Villages and it would be created only “[i]f a majority of all eligible Natives eighteen years of age or older who are not permanent residents of Alaska elect[ed] ... to be enrolled” in it. *See Alaska Native Ass’n of Oregon v. Morton*, 417 F. Supp. 459 (D. D.C. 1974). But the larger point is that this regional corporation for non-residents was provided with money but no authority over any land (whereas the regional corporations for residents were provided with both). This means that the corporation for non-residents does not have any powers that could give rise to an equal protection challenge.

Supporters of S. 1011 have pointed to the Supreme Court’s approval of the restoration of the federal government’s relationship with the Menominee tribe as well as *United States v. John*, 437 U.S. 634 (1978), as precedents for S. 1011, but in fact those examples demonstrate how far S. 1011 goes beyond the existing precedents. As to the former, Congress terminated its recognition of the Menominee Tribe and then later re-recognized the tribe. And in *United States v. Lara*, 541 U.S. 193, 203 (2004), the Supreme Court in dicta cited the Menominee example in saying that “Congress has restored previously extinguished tribal status – by re-recognizing a Tribe whose tribal existence it previously had terminated.”⁶ But less than 20 years passed between the passage of the statute terminating the government’s relationship with the Menominee Tribe and the statute re-recognizing it (and due to the lengthy lead time of the termination legislation, the actual period of time in which the federal government lacked a relationship with the Menominee Tribe was only 12 years). *See* 25 U.S.C. §§ 903b-c; *Menominee Tribe of Indians v. United States*, 491 U.S. 404, 408-410 (1968). And, significantly, the Menominee Tribe retained some political organization after its relationship with the government was terminated. That is, the relationship with the federal government ended, but the tribe continued to exist.

village or Native group of which he claims to be a member and whose father or mother is ... regarded as Native by any village or group” (a classification perhaps more likely to reflect real group membership than any blood quantum requirement). 43 U.S.C. § 1602(b). Many tribal constitutions define membership in terms of having had an ancestor whose name appeared on a tribal roll – but in the far less distant past.

⁶ *Lara* itself is inapposite, because in that case Congress was affirming the inherent authority of entities that were already federally recognized tribes; there was no issue of Congress conveying any authority on groups that had not been tribes.

John involved the question whether a crime occurred in “Indian country,” for purposes of 18 U.S.C. § 1151, and thus whether federal jurisdiction precluded state criminal jurisdiction. The Court noted that Mississippi argued that “the Choctaws residing in Mississippi have become fully assimilated into the political and social life of the State, and that the Federal Government long ago abandoned its supervisory authority over these Indians.” 437 U.S. at 652. But the Court stated in response both that “Mississippi has made no effort, either in this Court or in the courts below, to support this argument with evidence of the assimilation of the Choctaw Indians in Mississippi,” *id.* at 652 n.23, and, more broadly, that the history demonstrated that the Mississippi Choctaws had been functioning as a tribe for decades, and similarly had been treated as a tribe by the United States for decades. *See id.* at 645-46 (noting, *inter alia*, that “The Choctaws in Mississippi were among the many groups who, before the legislation was enacted, voted to support” the Indian Reorganization Act of 1934 (“Act”); that “[o]n March 30, 1935, the Mississippi Choctaws voted, as anticipated by § 18 of the Act, to accept the provisions of the Act”; that “[i]n December 1944, the Assistant Secretary of the Department of the Interior officially proclaimed all the lands then purchased in aid of the Choctaws in Mississippi, totaling at that time more than 15,000 acres, to be a reservation”; and that “[i]n April 1945, again as anticipated by the Indian Reorganization Act, the Mississippi Band of Choctaw Indians adopted a constitution and bylaws; these were duly approved by the appropriate federal authorities in May 1945”).

B. The Constitutionality of S. 1011 Depends on the Definition of “Indian Tribe[]” for Constitutional Purposes, and There Is No Clear Definition

The fact that S. 1011 is unprecedented and attempts to expand the boundaries of what is a tribe for constitutional purposes does not mean that it is unconstitutional. It may be that the constitutional definition of “Indian Tribe[]” under the Indian Commerce Clause, properly understood, includes the envisioned Native Hawaiian government. To answer the question whether or not this is so, we need to have a definition of “Indian Tribe[]” for constitutional purposes. Unfortunately, there is no clear definition.

One possible definition is the one put forward by the Supreme Court in *Montoya v. United States*, 180 U.S. 261 (1901) – the most-cited and most-quoted definition of “tribe,” and the only one the Court has put forward in the last 120 years.⁷ *Montoya* stated that “[b]y a ‘tribe’ we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.” *Id.* at 266. The Court did not state that these were the constitutional minima for an Indian tribe; it has never

⁷ *See, e.g., United States v. Candelaria*, 271 U.S. 432, 442 (1926) (adopting *Montoya*’s language as the definition to the term “any tribe of Indians” in the Indian Nonintercourse Act); *United States v. Chavez*, 290 U.S. 357, 364 (1933) (using *Montoya*’s language in defining “Indian country”); *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899, 902-03 (D. Mass. 1977) (treating *Montoya* as delineating the applicable requirements for treatment as a tribe). The main pre-*Montoya* case on the criteria for status as a tribe was *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876), which adopted a similar definition – “As long as [the Red Lake and Pembina Chippewa] Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the government, Congress has the power to say with whom, and on what terms, they shall deal....” *Id.* at 195.

confronted this constitutional question. In *Montoya* the Court was construing the word “tribe” from a statute, so the Court’s definition may have been merely descriptive of current tribes (or current conceptions of tribes), rather than prescriptive, or the statutory definition may otherwise have differed from the constitutional one. On the other hand, there was no suggestion in *Montoya* that the Court was relying on congressional intent, or that it was limited to a narrow context.

If *Montoya* supplies the only constitutional requirements for an “Indian Tribe[]” under the Indian Commerce Clause, the envisioned Native Hawaiian government could be structured to meet these criteria. The main limit under *Montoya* would involve the notion of a community.

The problem is that, in light of the enormous diversity among Native Hawaiians and the absence of any consistent connection other than descent from one aboriginal ancestor, it is not clear that Native Hawaiians who live in Hawaii constitute the sort of community that can be validly aggregated into a tribe. And it certainly seems to strain the notion of a community to include Native Hawaiians who do not live in Hawaii. But S. 1011 is not limited to Native Hawaiians who actually live in Hawaii or have a particular connection to it beyond a single ancestor. Still, this suggests a relatively easy fix, in the form of requiring a greater connection among Native Hawaiians. An obvious possibility in this regard would be to limit the definition of “Native Hawaiians” to those who reside in Hawaii and have some connections among themselves beyond ancestry. But the larger point is that, insofar as *Montoya* delineates the criteria for a tribe, these criteria can be met.

A potentially bigger problem for S. 1011 involves the possible requirement of a connection to a pre-existing tribal entity. Some sources suggest that there may be an additional requirement for status as a tribe that does not inhere in the current structure of a tribe and thus cannot be met so easily: that the tribe have a long and continuous existence as a functioning tribal organization. The Bureau of Indian Affairs’ regulations on recognizing tribes, as well as some lower court cases, indicate that this is an additional prerequisite for status as a tribe.⁸ If there is a requirement of continuous tribal organization, it would seem to preclude the creation of a Native Hawaiian tribe for constitutional purposes: Native Hawaiians have not remained in a tribal entity.

There is reason to doubt that continuous functioning is required. The BIA regulations define the groups that the federal government is willing to recognize, not necessarily those that it has the authority to recognize. And nothing in the term “Indian Tribes” suggests that an unbroken history is necessary. The Indian Commerce Clause’s use of the term “Indian Tribes” rather than “Indians” suggests that something more than an agglomeration of Indians is necessary, that there must be a group coherent enough to be called a “Tribe[].” But the same cannot be said of a requirement that such an Indian group have an unbroken history; the term “Indian Tribe[]” is consistent with both a formulation that would include such a requirement and one that would not.

⁸ 25 C.F.R. § 83.7(b) (requiring that “[a] predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present”); *id.* § 83.7(c) (requiring that “[t]he petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present”); *see also, e.g., United States v. Washington*, 641 F.2d 1368, 1372 (9th Cir. 1981) (“[T]he group must have maintained an organized tribal structure.”).

More important, if there is a requirement of a connection to a historical tribe, it is not clear that there is a further requirement of continuous functioning. The sources that have posited the criterion of a historical connection have differed on whether it requires merely that the current tribe be the successor to a historical tribe or that it also have an unbroken history of functioning as a tribe. In particular, the main circuit that deals with Native American law – the Ninth – has presented a shifting view on this issue. In a 1981 case, the court suggested that the tribal organization must have been maintained, though it found that such maintenance could be demonstrated “if some defining characteristic of the original tribe persists in an evolving tribal community.” *United States v. Washington*, 641 F.2d 1368, 1372-73 (9th Cir. 1981). In 1991, the court put forward a slightly broader formulation: “[A] relationship between the modern-day entity seeking tribal status and the Indian group of old must be established, but some connection beyond total assimilation is generally sufficient.” *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 557 (9th Cir. 1991). Finally, in a 1992 case, the Ninth Circuit stated that the members of a new tribe must meet *Montoya’s* criteria and demonstrate “that they are ‘the modern-day successors’ to a historical sovereign entity that exercised at least the minimal functions of a governing body”; significantly, the court did not suggest any requirement of continuous functioning from historical times until the present.⁹ Thus, assuming that there is a requirement of a connection to a historical sovereign entity, there is some judicial support for the suggestion that continuous functioning is not required.

A continuity requirement would be impossible for the new Native Hawaiian government to satisfy, but a connection to a previous sovereign would not. S. 1011 envisions the new Native Hawaiian government as the modern-day successors to the Hawaiian government.

But a stumbling block remains: the government that was overthrown in 1893 was a multiethnic oligarchical polity. The envisioned Native Hawaiian government, limited to descendants of pre-1778 inhabitants, would have a hard time establishing that its limitation to Native Hawaiians was consistent with the composition of the 1893 polity (or even that the 1893 government was an “Indian Tribe[]” for constitutional purposes). The obvious solution would be for the new Native Hawaiian government to assert derivation from a Native Hawaiian polity that did not include Westerners, as this would help to justify the limitation to Native Hawaiians. The difficulty with this solution is that Westerners’ influence stretches far back in Hawaii. Western residents had been eligible for naturalization since 1840 and had been treated as ordinary subjects, for purposes of the application of Hawaii’s laws, since 1829. *See* 1 Ralph S. Kuykendall, *The Hawaiian Kingdom 1778-1854*, at 129, 229-230 (1938); 1 Statute Laws of His Majesty Kamehameha III, ch. V, art. I, ss 3, 10-14 (1846). In fact, there were permanent Western residents dating back to the late eighteenth century, chief among whom were advisers to Kamehameha who helped him to overcome the rulers of the other islands and unite them under his rule in 1810. *See* Kuykendall at 25-51. Assuming that the goal of S. 1011 is to create a Native Hawaiian process that includes only pre-1778

⁹ *Native Village of Tyonek v. Puckett*, 957 F.2d 631, 635 (9th Cir. 1992) (quoting *Native Village of Venetie*, 944 F.2d at 559); *see also Pit River Home & Agric. Coop. Ass’n v. United States*, 30 F.3d 1088, 1096 (9th Cir. 1994) (stating that “group claiming tribal status must show they are ‘modern-day successors’ to a historical sovereign entity that exercised political and social authority”) (quoting *Native Village of Venetie*, 944 F.2d at 559).

descendants, then, the appropriate date for purposes of the derivation of the new tribe appears to be 1778 (before Westerners arrived). If so, however, then the legislation would probably need to create several tribes, corresponding to the kingdoms that existed at the time (i.e., with different rulers over different islands).¹⁰ If, on the other hand, the goal is to create a single Native Hawaiian government, S. 1011 would probably need to define “Native Hawaiian” as of 1810 at the earliest (which might mean the inclusion of some Westerners who are not descended from pre-1778 inhabitants).

II. The Supreme Court Has Articulated Both Broad Deference to Tribal Recognition and Limits to that Deference, and S. 1011 Will Test Those Limits

The Supreme Court has stated that it grants broad deference to determinations by the political branches regarding tribes. But it also has articulated limits. The main case is *United States v. Sandoval*, 231 U.S. 28 (1913). In that case, the Court concluded Congress could regulate Pueblo Indians as an Indian tribe. In its opinion, the Court stated both the deferential principle that “in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts” and the limitation that “it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe.” *Id.* at 46.¹¹ And in *Delaware Tribal Business Committee v. Weeks*, the Court stated that its recognition of Congress’s important role “has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment. [citing *Mancari*]. ‘The power of Congress over Indians may be of a plenary nature; but it is not absolute.’”¹²

Relatedly, the Supreme Court’s opinion in *Rice v. Cayetano*, 528 U.S. 495, 519 (2000), highlights both the difficulty of the constitutional questions surrounding a Native Hawaiian government and the seriousness with which the Supreme Court is likely to consider any challenge to actions by such a government. The case involved the 15th Amendment to the Constitution, and so its holding is not directly applicable here. But in the course of its opinion, the Court stated that Hawaii’s ancestry-based definition of Native Hawaiian (the same one used in S. 1011) was a proxy

¹⁰ Kuykendall identified four kingdoms as of 1778: one over the island of Hawaii and the Hana district of east Maui; a second over Maui (except the Hana district) and its three dependent islands; a third over Oahu; and a fourth over Kauai and Nihau. *See id.* at 30.

¹¹ *See also Baker v. Carr*, 369 U.S. 186, 216-17 (1962) (quoting same language from *Sandoval*, then stating, “Able to discern what is ‘distinctly Indian,’ the courts will strike down any heedless extension of that label. They will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power.”) (citation omitted); *United States v. Chavez*, 290 U.S. 357, 363 (1933) (quoting same language from *Sandoval*); *United States v. Candelaria*, 271 U.S. 432, 439 (1926) (same); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 582 n.3 (1st Cir. 1979) (“Nor can Congress arbitrarily label a group of people a tribe.”).

¹² 430 U.S. 73, 84 (1977) (quoting *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946)); *see also United States v. Sioux Nation of Indians*, 448 U.S. 371, 413 (1980) (stating that deference to Congress in tribal matters embodied in political question doctrine “has long since been discredited in takings cases, and was expressly laid to rest in *Delaware Tribal Business Comm[itee] v. Weeks*”).

for race, *id.* at 514; that the question “whether Congress may treat the native Hawaiians as it does the Indian tribes” was one “of considerable moment and difficulty,” *id.* at 519; and that “To extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs,” *id.* at 522.¹³

As these cases suggest, the Supreme Court would likely show great deference to Congress’s determination of tribal status, but it would not find that the determination alone was sufficient. Imagine, for example, legislation that mirrored S. 1011 except that it applied to all Native Americans (defined as having some Native American blood) in the continental United States who were not members of an existing tribe. So, as with S. 1011, the legislation would establish a process whereby this new, widely dispersed Native American tribe could be created. I do not believe that such a new tribe would be an “Indian Tribe[]” for constitutional purposes, and I believe that the Supreme Court would not defer to Congress’s judgment. The tribe would, I believe, run afoul of the broad limits laid out in cases like *Sandoval*. It would be too inchoate, with members with too little connection to a historic tribe and to each other.

If I am right about this hypothetical bill, the question is whether the actual S. 1011 is sufficiently different that it would be constitutional. It would be distinguishable in two main respects. First, there are tribes for Native Americans in the continental United States, so this hypothetical statute would apply only to Native Americans who are not eligible for, or are not interested in, joining an existing tribe. Native Hawaiians, on the other hand, cannot join an existing tribe, no matter their interest. But this might be a distinction without a difference. At first blush, it might seem that the hypothetical continental Native American government would include a larger number of people who were not particularly interested in joining a tribe (because at least some of its members might be people who were eligible to join a recognized tribe but chose not to do so). But this overlooks the fact that both S. 1011 and the hypothetical statute membership in the new government would require an affirmative act of joining. Both governments would be composed of people who chose to join them.

Second, Native Hawaiians might be a more cohesive group, with more of a shared history and shared connections, than the hypothetical tribe in the continental United States. This is the key

¹³ It also bears noting that, as a matter of Supreme Court jurisprudence, the envisioned Native Hawaiian government will be in a different position from existing tribes, because in the 20th century the constitutional ground shifted. Most tribes were recognized decades ago, long before the Supreme Court announced that the federal government was limited by principles of equal protection (via the Due Process Clause of the Fifth Amendment, *Bolling v. Sharpe*, 347 U.S. 497 (1954)), much less that racial classifications were subject to strict scrutiny (in *Adarand Constructors* in 1995). This means that, even if a given entity was an imperfect fit as a “tribe” at the point of recognition, that entity had been organized and recognized as a “tribe” for decades by the time any challenge would be possible. Whatever their origins, in other words, they had long since become the sort of entities that could be meaningfully called an “Indian Tribe[]” under the Indian Commerce Clause. The Native Hawaiian government, however, will not have such a long grace period before there is a tenable legal challenge to its authority. Such a challenge will be available from the outset, and it may well be brought. This may seem unfair, but that is the nature of changes in the Court’s jurisprudence.

difference between S. 1011 and the hypothetical legislation. The question is whether that difference is enough to distinguish S. 1011 from my hypothetical statute. It may well be, but, again, I do not think the matter is beyond doubt. The problem, as I noted in Part I.B, is that the only thing that unites Native Hawaiians as defined by S. 1011 is having one or more ancestors who lived in Hawaii before 1778. There is enormous diversity in the Native Hawaiian community. Simply stated, it is not at all clear that there are greater connections among Native Hawaiians, as defined in S. 1011, than among Native Americans in the continental United States. S. 1011 does include findings that suggest some connections among Native Hawaiians, and these findings may be helpful. But, as the Supreme Court has made clear in a variety of contexts, congressional findings are not dispositive.¹⁴ And, in any event, the question is the legal significance of any factual findings, whether made by Congress or the courts.

III. The Possibility that Federal Courts Will Completely Defer to Congress's Determinations Makes it All the More Important that Each Member of Congress Reach His or Her Own Judgment on the Constitutional Issues

Insofar as federal courts will defer to Congress's determinations, or no one will have standing to bring a judicial challenge to the envisioned Native Hawaiian government, it is all the more crucial that each member of Congress reach his or her own judgment about what the limits on an "Indian Tribe[]" are, and whether Native Hawaiians meet it. Saying that the courts will defer, or will never hear a case, does not mean that a given act is constitutional. I stress this point because in commentary and other testimony on this bill some have suggested that the possibility of the Supreme Court deferring to Congress means that this bill is constitutional. That is not the case.

The Constitution gives the political branches complete discretion over some decisions – impeachment, for example. So, if the House impeached a President, the Senate convicted the President, and the only reason they gave for impeachment and conviction was "we just don't like him," no court would block the impeachment and conviction. *See Nixon v. United States*, 506 U.S. 224 (1993). But those Representatives and Senators would have violated their own oaths to uphold the Constitution, because the grounds for impeachment and conviction would not be "high crimes and misdemeanors." U.S. Constitution, Art. II, § 4.

Or, to illustrate from my own experience: in 1994 and 1995, when I was in the Department of Justice's Office of Legal Counsel, we confronted a few legal questions that we knew would never

¹⁴ *See, e.g., Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000) (refusing to defer to congressional fact-finding, explaining that "The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch"); *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 370-74 (refusing to give determinative weight to Congress's evidentiary findings); *Crowell v. Benson*, 285 U.S. 22, 60 (1932) ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function"); *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) (quoting this statement from *Crowell v. Benson* and stating: "Although we review congressional factfinding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress' findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.").

get to a court of law – no one would have standing (or even know that the relevant government action had taken place). We could have decided that there were no legal constraints, because no court would oversee us. On the contrary, we took our obligation to determine legality all the more seriously, precisely because we were the only ones who were going to make that determination.

If courts will not independently review S. 1011, the Senate and House are in that position today: each Senator and Representative would need to come to his or her own legal conclusion about what is required for an entity to be an “Indian Tribe[]” and whether Native Hawaiians met those requirements, because Congress would make the binding Constitutional determination.

As the discussion above intimates, depending on one’s interpretation of “Indian Tribe[]” in the Indian Commerce Clause, a determination that a group constitutes a tribe can be a very fact-specific one, focusing on who among possible members has significant connections to the relevant community. Such factual determinations are ordinarily made by government agencies with expertise and experience in gathering these sorts of facts. There is, of course, no constitutional prohibition on Senators and Representatives undertaking such factual determinations on their own. The point is simply that some Senators and Representatives may interpret “Indian Tribe[]” to entail some factual investigation, and if so it is incumbent on them to engage in such investigation, or to authorize some other entity to do so.

IV. Conclusion: Amending S. 1011 To Put it on Stronger Constitutional Footing

S. 1011 pushes the limits of what constitutes an “Indian Tribe[]” for constitutional purposes. It may be that the Constitution is best understood as allowing for the Native Hawaiian government envisioned in S. 1011 as it is currently written, and that the courts would so conclude. If so, then there is no need to amend S. 1011. It may be that the courts (and in particular the Supreme Court) would conclude that S. 1011 goes too far and invalidates it on that basis. Most dramatically, the Supreme Court’s invalidation of S. 1011 may lead it to look more critically at other programs for Native Americans that appear to be based on ancestry (and that heretofore have been thought unproblematically constitutional). If the Court concludes both that S. 1011 runs afoul of equal protection principles and that S. 1011 is similar to existing statutes, the changes to Native American law could be profound.

The discussion above suggests the amendments that would put S. 1011 on more secure constitutional footing. The most obvious change to S. 1011, in my view, would be to limit the participants in the government process to Native Hawaiians who actually live in Hawaii. This change at least eliminates the possibility of people participating in the Native Hawaiian government process who have never been to Hawaii and have no connection to it beyond one or two ancestors who long ago left Hawaii. S. 1011 would still be unprecedented in its breadth, but at least there would be *some* narrowing of its scope.

A second, related change would be to require some meaningful and significant connection among those who participate in the process of creating the new Native Hawaiian government. Blood quantum requirements have sometimes served as a proxy for such a connection, but the constitutionally safer route is to abjure the proxy and develop criteria that demonstrate the existence of real bonds among those who will be members of the new government.

A final possibility would be either to include all descendants of members of the 1893 polity, or, perhaps more palatably, to divide up tribes by islands. This amendment would reflect Native Hawaiian political organization as of 1778.

My assessment of the risks leads me to recommend the first two changes, but not the third. Determining a margin of constitutional safety is impossible, though, and the decisions are of course yours to make. But, for what it is worth, these changes would put S. 1011 on stronger constitutional footing.